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SUPREME COURT, U.S.

No. 05-1660

IN THE

Supreme Court of the United States

COUNTY VANLINES, INC.,

Petitioner,

v.

EXPERIAN INFORMATION SOLUTIONS, INC., ALSO KNOWN AS EXPERIAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Second Circuit apply the correct standard under New York State law for determining whether Petitioner had overcome Respondent's state-law qualified privilege in a commercial defamation action?

2. Under the facts of this case, did Respondent commit defamation?

3. Was Petitioner deprived of due process by the Second Circuit's alleged application of the wrong qualified privilege standard under New York law?

PARTIES TO THE PROCEEDING

The Petitioner, appellant in the Court of Appeals, is County Vanlines, Inc.

The Respondent, appellee in the Court of Appeals, is Experian Information Solutions, Inc. ("Experian"), an Ohio corporation with its principal place of business in Costa Mesa, California. Experian certifies that GUS plc, a company publicly traded on the London Stock Exchange, is the ultimate owner of 100% of Experian.

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RESPONDENT'S BRIEF IN OPPOSITION

This case is a state-law commercial defamation action (removed to federal court on diversity grounds) brought by Petitioner, a moving and storage business, against Respondent, a credit reporting agency. Petitioner claims that Respondent defamed it by publishing a credit report that included information about both Respondent and a predecessor company with a nearly identical name that operated at the same address. The district court granted summary judgment for Respondent—and the Second Circuit affirmed—on the ground that Petitioner had failed to produce evidence of "malice" sufficient to overcome the qualified privilege to which credit reporting agencies are entitled under New York law. Pet. App. 3a-4a, 14a-26a.

Petitioner's argument for certiorari is that the lower courts erred by allegedly applying the wrong standard for overcoming Respondent's qualified privilege under New York law. Those courts interpreted New York law (correctly) as requiring a plaintiff seeking to overcome a qualified privilege to show either "common-law malice" (*i.e.*, spite or ill will) or "constitutional malice," *i.e.*, the *New York Times v. Sullivan*, 376 U.S. 254 (1964), standard developed in public-figure defamation cases. Pet. App. 3a-4a. Petitioner argues that instead of interpreting New York law as borrowing the *Sullivan* standard as a way of judging qualified privilege claims, the lower courts should have interpreted New York law as borrowing from federal law the easier-to-overcome standard of fault applicable in private-figure defamation cases. Pet. 6-14. What Petitioner fails to recognize is that its objection to the ruling below does not concern any issue of federal law—Petitioner is merely challenging the Second Circuit's holding as to what a

plaintiff must show under *New York* law to overcome a defense of qualified privilege. This raises no issue meriting this Court's attention.

STATEMENT

In April 2001, Petitioner County Vanlines ("CVL"), a moving and storage business, applied for a loan from the Westchester County branch of the Bank of New York. As part of the loan approval process, the bank requested a copy of Petitioner's credit report from Respondent Experian, a credit reporting agency. Experian's report included information on both Petitioner and another company, County Van and Storage ("CVS"), based on the similarity between the companies' names (exacerbated by Petitioner's erroneous three-word listing of its own name as "County Van Lines") and the fact that the two companies shared the same address and telephone number. Pet. App. 2a-3a. The names were linked by Experian's computer system, which constructs credit reports using a program that identifies companies based on similarity of data. *Id.* at 3a.

After the bank denied Petitioner's loan application, Petitioner sued in state court for defamation, alleging that the linkage with CVS was defamatory in light of certain negative credit history that applied to CVS, including late payments and a tax lien. After the case was removed to the U.S. District Court for the Southern District of New York, the district court granted summary judgment for Respondent, on the ground that Respondent was entitled to a qualified privilege under New York law that could be overcome only by a showing of common-law or constitutional malice. Pet. App. 14a-16a. The court explained that there was no

evidence of common-law malice, and that under "the case law of New York," constitutional malice sufficient to "pierc[e] the qualified privilege in the credit reporting context" required "reckless conduct on the part of the credit reporter. Mistakes arising from ordinary negligence will not overcome the qualified privilege."*Id.* at 18a. Because Petitioner had failed to create "a triable issue of fact as to whether defendant acted with reckless regard for the truth in issuing the April 2001 credit report," *id.* at 23a, Respondent was entitled to summary judgment.

On appeal by Petitioner, the Second Circuit affirmed. The court began by noting that "[i]t is undisputed that credit reporters enjoy qualified immunity from defamation actions and that therefore County Vanlines would need to show common-law or constitutional malice to prevail." Pet. App. 3a (citing *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957)). After observing that there was "no evidence" of the spite or ill will necessary to establish common-law malice, the court held that Petitioner had failed to produce "any evidence that Experian issued its report recklessly, *i.e.*, 'with [a] high degree of awareness of [its] probable falsity,' so as to meet the constitutional malice standard." Pet. App. 3a-4a (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Accordingly, the Second Circuit held, Petitioner could not overcome the qualified privilege provided to Respondent by New York law.

REASONS FOR DENYING THE PETITION

Petitioner seeks certiorari based on the argument that the decision below conflicts with this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and

Dun & Bradtreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). Petitioner apparently sees a conflict between the Second Circuit's ruling and the holdings in *Gertz* and *Greenmoss* that the First Amendment does not require a plaintiff to show "actual malice" before recovering in a defamation case.

This argument fundamentally misunderstands the decision below. That decision was not based on any holding about what the First Amendment required Petitioner to show. Rather, Petitioner's claim failed because *New York law* required Petitioner to show malice (either common-law malice or constitutional malice). *See, e.g.*, Pet. App. 14a-20a (describing showing of malice required to overcome qualified privilege granted credit reporting agency by New York law); *Liberman v. Gelstein*, 80 N.Y.2d 429, 438-39 (1992) (explaining that under New York law qualified privilege can only be overcome by showing of common-law malice or *New York Times v. Sullivan* "actual malice"). Needless to say, neither *Gertz* nor *Greenmoss* holds that a State may not require a plaintiff to demonstrate actual malice to overcome a state-law qualified privilege. Accordingly, there is no conflict between the decision below—applying an actual malice standard as a matter of state law—and this Court's cases.

Moreover, to the extent Petitioner is arguing that the Second Circuit misinterpreted New York law—*i.e.*, that the Second Circuit should have concluded that New York law called for application of some lower standard than actual malice, *see* Pet. 11-12—that state-law

argument (in addition to being incorrect [1]) plainly presents no issue appropriate for this Court to address.

Furthermore, Petitioner's argument that the courts below incorrectly assessed the evidence in the summary judgment record, Pet. 14, is precisely the type of fact-bound, record-intensive question that this Court routinely and appropriately declines to review.

Finally, Petitioner argues that it was denied due process by the lower courts' assessment of the evidence and the alleged conflict with this Court's decision in *Gertz*, Pet. 16-18, but this argument is merely a repackaging of Petitioner's meritless and fact-bound arguments discussed above, and presents no legitimate issue for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] Petitioner argues for application of the standard of *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975), which sets forth the general standard for liability under New York law in a defamation case involving a non-public-figure plaintiff. However, *Chapadeau* does not concern the issue in this case, which is not the *general* standard of liability in a defamation case but rather the standard for overcoming a qualified privilege.